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CURRENT TOPICS.

Buffitt v. State, is a very sensible decision of the Supreme Court of Wisconsin, recently delivered upon the time honored question whether, under an information for selling liquor without a license, it is incumbent upon the prosecution to show that beer is a "malt or intoxicating liquor." The court below held that it was not, saying, in ruling upon a question of evidence, "I suppose every body knows what is meant by beer;" and when the question was asked whether malt is used in ordinary beer the court said: "I do not think it is necessary. I think a man must be almost a driveling idiot, who does not know what beer is. I do not think it necessary to prove what it is."

This ruling the court above affirmed saying: "When the general or primary meaning of a word is once established by such common usage and general acceptation, we do not require evidence of its meaning by the testimony of witnesses, but look for its definition in the dictionary. Whiskey, according to Webster is 'a spirit distilled from grain,' and beer, according to the same authority is 'a fermented liquor made from any malted grain with hops and other bitter flavoring matter.' It is true that to a limited extent there are other kinds of beer, or of liquor called beer, such as small beer, spruce beer, ginger beer, etc., but such definitions are placed as remote and special and not primary or general. So it may be said of other substances, having a common name and meaning, such as milk or tea. Milk, according to Webster, is 'a white fluid secreted by female manmales for the nourishment of their young.' There are other kinds of milk, however, such as "the white juice of plants" which is the remote definition, or milk in the cocoanut or that in the milky way. Tea is defined to be 'leaves of a shrub or small tree of the genus *Thea* or *Camellia*. This shrub is a native of China and Japan.' There are other kinds of tea, such as sage tea, chamomile tea, etc. The latter are the restricted uses of the word. When asked to take a drink of milk or cup of tea, it would not be necessary to prove what it meant. Why is it more necessary to prove what is meant by a glass or drink of beer? When beer is called for at the bar in a saloon or hotel, the bartender would know at once from the common use of the word, that strong beer, a spirituous or intoxicating beer was wanted, and if any other kind was wanted, the word would be qualified, and the particular kind would be named, as root beer, or small beer, etc. When therefore the word beer is used in court by a witness, the court will take judicial notice that it meant a malt and an intoxicating liquor, or such meaning will be a presumption of fact and in the meaning of the word itself there will be *prima facie* proof that it is malt or intoxicating liquor that is meant.

When the witnesses in this case testified that the defendant sold to them beer, the prosecution had sufficiently proved that he had sold to them a malt and intoxicating liquor, for both qualities are implied in the word beer. This, as a logical conclusion and principle of law, would seem to be well established by common reason, and we think it would be difficult to find a single good reason against it. As to decisions and authorities upon the question, it must be confessed it would seem that those which require proof that beer or the liquor sold by that name is intoxicating have at least the weight of numbers. But there are many authorities of the very highest judicial source and based, as we think, on the far better reason, which hold the doctrine we have indicated. These we feel bound to follow. In Nevin v. Ladue, 3 Denio, 43, the question was one of law whether 'Ale' was a 'strong and spirituous liquor,' within the statute, and it was held that it was, from its long use and well-known qualities and from common knowledge and its definition in Webster. In People v. Wheelock, 3 Parker's Cr. Reps, 9, it is said in the opinion: "The word 'beer' in its ordinary sense denotes a beverage which is intoxicating, and is within the fair meaning of the words 'strong and spirituous,' as used in the statutes, and it was held, that it was incumbent upon the defendant to show that the word was used in a restricted or qualified sense, such as to denote root beer, molasses beer, etc., and this is unquestionably the correct rule in such cases. In Board Com'rs of Excise, etc. v.

Taylor, 21 N. Y., 173, it was held that "strong beer" was within the statute. In Reu v. People, 63 N. Y., it is held, that 'strong beer' was within the statute. In State v. Goyette, 11 R. I. 592, it is held, that the court should take judicial cognizance and without evidence, that 'lager beer' is a malt liquor, and it is said in the opinion by Chief Justice Durfee: 'Lager beer is and has been for many years a familiar beverage in this country. Its constituents are enumerated not only in books of science but in popular encyclopædias. It is a malt liquor of the lighter sort and differs from ordinary beers and ales, not so much in its ingredients, as in its process of fermentation. The government might almost as well be required to prove that gin or whisky or brandy is a strong liquor, as to prove that lager beer is a malt liquor.' In Massachusetts 'strong beer and lager beer' are to be deemed to be intoxicating by statute, and that is conclusive. Conn v. Anthes, 12 Gray., 29. Many authorities to the same effect are referred to in the above cases, and many more might be cited. It is useless to cite or comment upon that large class of authorities which hold the other way, for we disapprove of them and follow these founded, as we think, in the better reason."

DOES A BONUS MAKE A LOAN OF MONEY USURIOUS?

The strong position taken by the Supreme Court of Nebraska, on the question of money loans made usurious by a premium or bonus exacted by the lender or his agent, is so much in conflict with the law as laid down by other courts, that it may not be time lost to refer briefly to some of these decisions and to state as nearly as possible what the rule of law is regarding the subject of this article.

The question may arise under circumstances growing out of three classes of cases. 1st. The bonus may be exacted by the lender himself. 2d. It may be exacted by the lender's agent for the latters benefit, or 3rd. It may be received by the borrower's agent. Each class of cases is subject to rules of its own and will be considered separately.

When a lender of money demands and receives from a borrower more than legal interest for the use thereof, no matter under what name the transaction may have taken place, the contract is so clearly usurious as to need no further comment. It is only when the transaction is ostensibly for some other apparently innocent purpose, that a question can arise as to its legality, and it is to this class of cases that we propose to direct our attention.

The question has arisen and been decided differently by different courts whether or not a charge of a commission in addition to legal interest for advancing money is a valid charge when made by a commission merchant or broker.

In Haven & Co. v. Hudson,[1] the court held that it was usury for commission merchants to charge in addition to legal interest, the customary charge of two and a half per cent. commission upon cash advances. In Rowland, Smith & Co. v. Bull,[2] the court say: "The commission charged for advancing money in addition to the interest we think is usurious and more especially in view of the facts in the case. * * * And we are not satisfied that a commission charged for advancing money in addition to the interest would in any case be free from usury."

On the other hand there is a large number of cases that hold that the commission charged in addition to the legal interest does not constitute usury if it be a *bona fide* charge for extra trouble and expense.[3]

In Suydam v. Westfall,[4] it was held that the charge of 2 1-2 per cent. commission for making advances by a commission merchant was a customary charge for such business and was not usurious. To this opinion Cowen J., dissented.

The rule seems to be that when the commission or bonus is charged for *bona fide* work done or expense incurred, which charge may be separated from that for interest, the loan will be supported.[5]

1 12 La. An. 660; Lalande v. Breans, 5 Id. 505; See also Gill v Berlin, 12 Id. 723; Patterson v. Leach, 5 Id. 547; Stark v. Sperry, 6 Lea. (Tenn.) 411; Cluster v. Apperson, 4 Heisk. 639.

2 5 B. Mon. 146.

3 Hall v. Daggett, 6 Cow. 653; Nourse v. Prime, 7 Johns. Ch. 69; Suydam v. Bartle, 10 Paige 94; Comyn on Usury, 5 Law Library, 45.

4 4 Hill 211.

5 Auriol v. Thomas, 2 T. R. 19; Baynes v. Fry, 15 Ves. 121; Trotter v. Curtis, 19 Johns. 160; Palmer v. Baker, 1 Maule & Selw. 56; *Ex parte* Jones, 17 Ves.

In Palmer v. Baker,[6] the court based their decision upon the answer to the question whether the sum of 200 pounds, agreed to be paid as a compensation for trouble in addition to the reservation of five per cent. interest, was intended as an additional bonus for the advance of the money or not. If the bonus was to influence the loan, it was clearly usurious, but if it were for the trouble and expense to which the lender was subjected in making the loan, then the transaction was a fair one.

Under these decisions it is clear that if the lender be compelled to examine titles and securities to be given by the borrower a bonus or commission paid for this purpose will not taint the loan with usury.[7]

The second class of cases in which a bonus is sometimes paid, is when it is exacted by the lender's agent for his own benefit.

When the agent acts wholly for the benefit of his principal, who receives the benefit of the bonus, the general rule of agency applies and the principal is bound by his agent's acts the same as if he had done them himself.[8] For this reason the rules already given apply and it remains to consider the effect of the agent's acts, when he himself obtains the benefit of the bonus.

In Philo v. Butterfield,[9] the supreme court of Nebraska made use of the following language: "It is a settled rule of law which will not be questioned that in all cases where a person employs another as his agent to loan money for him and places the funds in the hands of the agent for such purpose, the principal is bound by the acts of his agent and if the agent charge the borrower of such money unlawful interest or even demands and receives from the borrower a bonus for such loan and appropriates it to his own individual use either with or without the knowledge of his principal, the principal is affected by the act of his agent."

In another case, recently decided, the same court found no reason to depart from the position taken in the above cited case as the following language will show: "If loans made by an agent are not restricted or controlled by the statute, all that is necessary to evade the law, is to employ an agent to make the loan. * * * In conclusion we hold that where an agent is engaged in the business of loaning money for his principal at the highest rate allowed by law, and contracts for a bonus or commission from the borrower in excess of lawful interest, the contract will be tainted with usury. The whole transaction is but one contract and being within the scope of the agency the lender is bound by it."[10]

These decisions go farther than those of other courts and it would be safe to say that the doctrine here advanced is not generally assented to.[11]

The doctrine laid down in Condit v. Baldwin,[12] formed a precedent which has been so closely followed in New York as to become established in that State. In this case the court held that a bonus, exacted by the agent, without the knowledge and consent of the principal, did not make the loan usurious. The question was decided by a divided court and Comstock, J., delivered a dissenting opinion. He held that the contract to make the loan and the agreement of the borrower to pay a bonus constituted but a single contract. He says: "The agent said in substance, 'I will lend you four hundred dollars, if, besides the interest you pay my principal, you will pay to me the sum of twenty-five dollars.' This is a single indivisible proposition and as such was accepted by the borrower. In consideration of the loan he agreed to repay it at a certain day with interest and he agreed also to pay the lender's agent twenty-five dollars more. Here was one consideration and one agreement."

The same question came up again in the same court, and although the opinion in the above case was questioned it was followed by a divided court on the doctrine of *stare decisis*.[13]

332; Fussell v. Daniel, 10 Exchcq. 581; 3 Par. Cont. 133.

[6] 1 Maule & Selw. 41.

[7] Eaton v. Alger, 2 Keyes 41; Thurston v. Cornwell, 38 N. Y. 281; 8 N. W. Rep. 429; Beadle v. Munson, 30 Conn. 175.

[8] Pearson v. Bailey, 23 Ala. 537.

[9] 3 Neb. 256.

[10] N. E. Mort. Sec. Co. v. Hendrickson, 15 Cent. L. J. 132, C. S.; Olmstead v. N. E. Mfg. Sec. Co. 11 Neb. 487; See also Cheny v. Woodruff, 6 Id. 185; Cheny v. White, 5 Id. 256; 9 N. W. Rep. 650.

[11] Acheson v. Chase, 9 N. W. Rep. 734.

[12] 21 N. Y. 219.

[13] Bell v. Day, 32 N. Y. 165; see also, Estervez v. Purdy, 66 id. 446; Moore v. Bogart, 26 id. 227; North v. Sergeant, 33 Barb. 350; Elmer v. Oakley, 3 Lansing, 34; Sniffin v. Koechling, 45 N. Y. Supt. Ct. 61.

However in Algur v. Gardner[14] it was held that if the agent made a loan at more than legal interest and although the principal knew nothing of and received none of the excess, the loan was usurious. The case questioned the law as laid down in Condit v. Baldwin.

The Supreme Court of Minnesota has recently rendered a very strange decision. The court laid down a rule which can scarcely be reconciled either with law or common sense. A money lender placed his money in the hands of an agent to be loaned at the highest legal rate of interest. The principal was to pay his agent nothing for his services but authorized him to demand and receive from the borrower a reasonable sum for his trouble. He did so and the borrower claimed that the loan was usurious and the court held it was not, on the ground that the lender did not know that a bonus had been demanded and that the agent acted solely upon his own responsibility. It seems strange that the lender could take the highest rate of interest and then make the borrower pay his agent for his services without knowing that more than legal interest had been charged. It would be difficult to understand how knowledge more direct could be given him.[15]

In Illinois the court made a decision in direct conflict with the one given above. In this case an agent was given funds by his principal to place at interest, the latter to receive the highest legal rate, and the agent was authorized to look to the borrower for his pay. The court held that this was sufficient to charge the principal with knowledge of the extra charge, as it was the same as if the lender had hired the agent and paid him directly, afterwards charging the amount to the borrower. The fact that the agent was paid for his services to the lender indirectly, by no means purged the transaction of usury.[16]

The court in this case cited the Nebraska decisions with approbation but questioned the law as given in Condit v. Baldwin.

The Supreme Court of New Jersey seems to have gone as far to one extreme as that of Nebraska has to the other. In Conover v. Van Mater the court in speaking of a loan made by an agent who had charged a large sum as a bonus for the loan, say: "The evidence offered is that the borrower paid the agent $336 as a premium on that loan, but there is no evidence that any part of this was paid to the complainant directly or indirectly, or that he agreed to receive it or any part of it. There is no evidence even that he knew it, though if he had known that his brother (as agent) had received this or any other amount of illegal brokerage for effecting this loan, it could in no wise have tainted this loan with usury."[17]

The correct rule seems to be that if an agent exact more than legal interest without the knowledge of the principal, and under circumstances where this knowledge cannot be presumed, the principal is not bound by the agent's acts;[18] but the rule is different when the agency is a general one, as in this case knowledge will be presumed.[19]

An agent may charge for *bona fide* labor and trouble and if the charge is a customary one under such circumstances it will be supported.[20]

The question as to whether the bonus was for an innocent purpose or a cover for usury is for the jury.[21]

The third class of cases that demands our attention is when the agent of the borrower is paid a bonus for his services in obtaining the loan. In such a case it seems that the agent may demand and receive a bonus without affecting the right of the lender, nor does it matter whether the lender knew that the bonus was to be paid so long as he did not receive any of its benefits.[22]

In Ottillie v. Waechter, the court say: "The case then would seem to be narrowed down to the simple question whether the contract was rendered usurious because Weinhagen, the sole agent of the defendants (the

[14] 54 N. Y. 360.
[15] Achison v. Chase, 9 N. W. Rep. 734.
[16] Payne v. Fewcomb, 100 Ill. 611.
[17] 18 N. J. E. 481.
[18] Gokey v. Knapp, 44 Ia. 32; Wylis v. Ault, 46 id 46; Baxter v. Buck, 10 Vt. 548; Dagnal v. Wigley, 11 East 42; Muir v. Newark Savings Inst., 16 N. J. E. 537.
[19] Austin v. Harrington, 28 Vt. 130; Rogers v. Buckingham, 33 Conn. 81; McFarland v. Carr, 16 Wis. 259.
[20] Bellinger v. Bourland, 87 Ill. 513; Eldridge v. Reed, 2 Sweeny 155; Condit v. Baldwin, *supra*; McFarland v. Carr, *supra*; Atlanta & C. Co. v. Gwyer, 48 Ga. 9.
[21] Cockle v. Flack, 93 U. S. 344; Stevens v. Davis, 3 Met. 211.
[22] Ottillie v. Waechter, 33 Wis. 252; Sage v. McLaughlin, 34 id 550.

borrowers) informed the plaintiff that he was to receive $100 for his services in effecting the loan? We are unable to understand upon what ground it can be said that this circumstance tainted the loan with usury. This brokerage transaction was a matter exclusively between the defend ants and their agent, The plaintiff was not benefited by it and has not directly or indirectly received any part of the compensation which the defendants saw fit to pay him for his services in procuring the loan."

The question sometimes arises as to the effect of the principal suing upon a contract for a loan which had been made by an agent exacting more than legal interest without the knowledge of the principal. In Austin v. Harrington,[23] it was held that the principal in suing upon such a contract ratifies the act of his agent and becomes liable for his misconduct.

But it would seem that this could be so only when the note or security showed on its face that more than legal interest had been charged.[24] In fact we cannot see how there could be any ratification unless the principal knew that the contract sued on, had been made illegal by the acts of his agent. A person cannot be held to ratify an act unless he knew the act was committed. And thus it was held in the last two cases cited above.

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Detroit, Mich.

[23] 28 Vt. 130.

[24] Condit v. Baldwin, *supra;* but see Comstock's opinion in this case; Bell v. Day, *supra.*

SLANDER AND SPECIAL DAMAGE.

The law of libel, which of late has been so often the subject of comment in one of its chapters of blasphemy, has many curious and interesting bye-ways in its more private bearings on the reputation of individuals. Slander, which is merely unwritten or unprinted defamation, is the name usually given to this head of wrongs, and is founded on the theory that each person has a species of property or vested interest in his own reputation. His character or reputation is made up of the whole acts of his life, and when viewed as a whole, he is deemed by his neighbors to show the possession of certain qualities, good or bad, but of course mostly good, and whoever maliciously and offensively denies the existence of this little fund of good qualities and by which he often obtains his living, commits a wrong for which the law often gives redress. But it is a very nice and difficult operation to calculate in many of these supposed injuries whether a plaintiff is likely to succeed in his action, for he must satisfy a jury of twelve indifferent persons as to the substantial nature of the injury, and in many cases he must allege and prove that some specific loss of money, or money's worth immediately flowed from the slander. This, in other words, turns on the doctrine that slander involving an attack on personal character and not imputing any crime, but merely imputing some moral defect must be followed with special damage before legal redress can be obtained. Hence the attempt to define what is special damage is difficult, and it is not the less so to show that it resulted from the slander as a natural if not inevitable consequence.

These difficulties are seen and felt in classes of cases where scurrilous language is used, but where such language is so wide and sweeping that it does not hit anyone in any vital part. To call scurrilous names is usually not an actionable wrong at all. It was once said of a member of parliament that "he never kept his word except where his own interest was concerned," and the courts held that this, when said of a member of parliment, would be actionable. But if it were merely said of him—"as to instructing our member to obtain redress we might as well instruct the winds, and should he promise us his assistance, I should not expect him to give it us," this last would be clearly not actionable.[1] This shows the nicety of discrimination required in order to judge of what is actionable and what is not. Another peculiarity of the law is, that the mere imputation of immorality against a person is not usually actionable, though it may be so when fatal to one's profession, such as to a clergyman or a physician. On one occasion an actress had been libelled as immoral, and she was so shaken in her nerves that she could not act her part well, and the proprietor of the theater sued the libeller; but Lord Kenyon said

[1] Onslow v. Horne, 3 Wils. 177.

that the damage was not sufficiently shown to be an immediate result so as to found an action.[2]

It might be thought that though a charge of immorality against a man may not be actionable in itself, yet the same charge when made against a female might be expected to be actionable. Yet even this is not the accepted rule. For, if a female is taunted with immorality, she will have no right of action unless she can prove that she thereby lost her reputation, and lost some substantial advantage, such as the loss of several suitors, and she must even, in the latter case, name the suitors thereby lost. In one case a clergyman sued a libeller for attacking his moral character, whereby he lost a lady whom he was "seeking in marriage, and who was likely to obtain for him good preferment." And the court held that this was actionable.[3] The mere loss of the society of friends which follows on such an imputation against a female is deemed insufficient. Thus the mere loss of becoming a member of some society or congregation of dissenters which refused admittance to a candidate on account of a slander on her chastity has been held to be no substantial damage.[4] In another case, however, a spinster lady successfully sued a defendant for saying of her that she was incontinent, whereby, as she alleged, she had lost the society and hospitality of friends who used to invite her to their houses, and to entertain her with meat and drink, and thereby enabled her to live more cheaply than she could do without such help; and the court held that this was a substantial pecuniary loss, and being proved she was entitled to sue and recover damages.[5] But a still more peculiar case arose where a married woman brought an action for a slander on her character as to conduct of hers before her marriage. She sued the slanderer, alleging as special damage that she had lost her husband's society, for he had separated from her in consequence. The court, however, doubted whether an action would lie for such loss of society by a wife; and, at all events, in this case the special damage was not the natural consequence of the slander, because a prudent husband would not on account of it have acted so unreasonably as to separate from the wife, he would merely have watched her conduct a little more carefully.[6] In that case, which reached the House of Lords, it was conceded that the law of this country was in a discreditable state by making it so difficult for a female to obtain redress for slanders on her moral character.

A subsequent case, however, to some extent strengthened the claim of females to this kind of protection. In Davies v. Solomon,[7] a married lady again brought an action for a slander on her reputation, which consisted in asserting some immorality committed before her marriage. She alleged as the cause of action that by this false and malicious slander she became alienated from and was deprived of the co-habitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends (and she named three of these), who had by reason of the slander, withdrawn from the companionship and ceased to be hospitable to or to be friendly with the plaintiff. This declaration was demurred to, and the court heard arguments and ultimately overruled the demurrer, holding that the allegations, if proved, showed a good cause of action. The court consisted of Blackburn, Mellor and Hannen, JJ. Blackburn, J., said that the declaration was well drawn so as to include all that had been alleged in previous cases, and setting forth sufficient details of a substantial injury. He said "I cannot see that any consequence could more naturally even necessarily follow such a charge as this made against a respectable woman. Lastly, an objection has been thrown out to the wife having been joined with her husband in bringing the action, the injury as is alleged being only to the pocket of the husband when the wife loses the hospitality of her friends. This seems to me to be artificial reasoning: the wife may sustain sufficiently real injury in her own person, even if it be only in consequence of the loss of food and drink given her by her friends, which might be superior or more plentiful than her ordinary style of living. The declaration, I think, is good." Thus this last case seemed fairly to establish the

2 Astley v. Harrison, Peake 256.
3 Wicks v. Shepherd, Cro. Ch. 155.
4 Roberts v. Roberts, 5 B. & S. 384.
5 Moore v. Meagher, 1 Taunt. 139.
6 Lynch v. Knight, 9 H. L. C. 599.
7 L. R. 9 Q. B. 114.

position that the loss of hospitality of friends consisting of pleasant dinners and suppers is a very sufficient and substantial benefit, the loss of which, when caused by malicious and wicked slanders ought to be redressed by the law.

It is true that actions founded on the loss of hospitality are not very often brought, for few people would take the trouble of making a grievance of what most sensible people can protect themselves against sufficiently. If one's friends are so very precarious in their allegiance as to fall off at the first breath of slander and believe the slanderers rather than the denial of a friend, they cannot be very valuable associates or people whose loss ought to be regretted. But it is well that the law should keep in its armory a resource such as an action of damages for exceptional occasions. The reason why the loss of hospitality is deemed a legal ground of action is much more sentimental than pecuniary. The money value of a friendly dinner at any time is but small, yet the social estimation which is the basis of the invitation, and the inducing cause of the friendly feeling which it implies, is the real and valuable thing which leads one to resort to legal redress.

If the loss of hospitality is a fair legal ground of action when caused by the baseless slanders, it is not to be wondered that another badge of social estimation, such as the belonging to a club, should be coveted and defended on the same grounds. Dr. Johnson looked upon a man as only half a man if he was not clubbable. To be clubbable implies a host of valuable attributes, and the qualification for it is a little genealogy in itself. It has the aroma of all the leading virtues. It brings with it all the advantages arising from good neighborhood, friendly help, much flattery, a little self indulgence, and a great deal of eloquent conversation, and the command of secret and confidential gossip of all kinds and on all subjects. To belong to a good club is the very backbone of happiness to many a worthy and well conducted gentleman. And it is said that so highly prized is the distinction of being a member, that most of the best clubs have a long *queue* of expectant and eager candidates waiting patiently for years, for the felicity of being admitted to the celestial converse of those who have gone into the beautiful gates before them. This is, as everybody knows, an honorable ambition which nobody can see any great harm in, and which the law may well protect against malicious attacks and interference. And a very recent case of Chamberlain v. Boyd,[8] well illustrates the strength and weakness of this kind of reputation.

The last action was brought by a gentleman, who alleged that he had been a candidate along with a brother for membership of the Reform Club, the defendant being already a member of the club. Upon the ballot for members, the plaintiff and his brother were not elected. Subsequently, a meeting of members of the club was called to consider the alteration of the rules as to election, and the defendant took an active interest in that matter. With a view to prevent the alteration of the rules, and to exclude the plaintiff from membership, it was alleged that the defendant spoke certain malicious slanders to the effect that the plaintiff and his brother had been all but expelled for bad conduct from a club at Melbourne. By reason of this slander, the defendant induced the majority of members of the club to retain their regulations, and thereby prevented the plaintiff from again seeking to be elected to the club. And the plaintiff thus lost the advantage which he would have derived from again becoming a candidate, with the chance of being elected, and the plaintiff suffered in his reputation and credit.

This statement of claim was demurred to on the ground that no sufficient cause of action was shown. The argument turned partly on the high worldly estimation which the membership of a club involved, and that it was quite substantial enough to be protected by the law, for if not money it was money's worth. There was also a contention that even if it were so, still there was a *non sequiter* in the alleged special damage, for it did not at all follow that the plaintiff's chance of election was prejudiced by anything that the defendant said. The cases above referred to were the chief authorities relied on in the argument.

The court of appeal, differing from the judge who had overruled the demurrer, held the demurrer to be good on two grounds. Two at least of the judges held that the loss of membership of a club was not substantial

[8] 47 *Justice of the Peace* 372.

enough to be legal ground of action. They thought such causes of action had gone far enough already, and that they should not be extended, this ground being too vague and sentimental. All the three judges also agreed that the special damage was too remote, for it did not at all appear that the chance of election was, or could be lessened in the minds of sensible men by a mere unsupported malicious statement like this. So the plaintiff lost his case.

Those who look upon club life as the summit of felicity will be somewhat shocked at the callous way in which the judges treated this laudable ambition, and if it had not been for the *non sequiter* of special damage it was a case well worthy being taken to the highest court of the realm for the purpose of being further tested.—*Justice of the Peace.*

NEGLIGENCE — DAMAGE CAUSED BY WORKMAN EMPLOYED BY AGENT.

HUGHES v. PERCIVAL.

English Court of Appeal.

The defendant was owner of a house adjoining the house of the plaintiff. The defendant in rebuilding his house employed a competent architect and builder for that purpose. During the construction of the house the workmen employed by the defendant's builder negligently cut into an old party wall without the knowledge of the defendant and his architect. In consequence of these acts the defendant's house fell, and in falling injured the plaintiff's house. *Held*, that the defendant was liable for the injury so occasioned.

The defendant (the now appellant) was owner of two houses at the corner of Panton street and the Haymarket, adjoining on one side the respondent's house—No. 3, Panton street—and on the other a house occupied by one Baron.

The appellant proceeded to pull down his houses, and build a new house on the site formerly occupied by them.

The new house was supported on the side next Baron's premises by an old party wall, which was pulled down to within twenty feet of the ground, and the wall of the new house was built on to it.

The work had been nearly completed when, in the course of fixing a staircase, the workmen, contrary to the orders and without the knowledge of the contractor employed by appellant, who, it was admitted, was a fully competent person to undertake the work, cut into the old party wall.

The result of this act was that the wall gave way, and the whole of the new house collapsed, and thereby caused damage to the respondent's house, for which this action is brought.

The contractor, on receiving notice of what had been done by the workmen, at once took measures to have the wall in question supported, but, nevertheless, the house fell as described.

At the trial before Manisty, J., that learned judge held, on the opening of counsel for the plaintiff (the facts not being in dispute), that the defendant was *prima facie* liable, and Philbrick, Q. C., counsel for the defendant, then addressed the jury, and on the conclusion of his address the learned judge held that, upon the case as opened by counsel for the defense, there was no defense to the action, and directed the jury to find a verdict for the plaintiff.

The defendant having obtained a rule in the Queen's Bench Division to set aside this judgment, the rule was, on the 21st of December, 1881, discharged, and this judgment of the Queen's Bench Division was affirmed on appeal by the Court of Appeals (Baggallay and Brett, L. J.J.: Holker, L. J., dissenting).

The defendant thereupon appealed to this house.

Philbrick, *Q. C.*, and *Kingsford*, for the appellant.—It is admitted that if the work which caused the injury was in itself hazardous, the appellant would be liable. Angus v. Dalton, 30 W. R. 191, L. R. 6 App. 829; Bower v. Peate, L. R. 1 Q. B. D. 321, 24 W. R. Dig. 226. But in this case the injury was caused by the wrongful act of a workman in executing work in itself harmless. The hazardous work was over, and but for the wrongful act no injury would have been occasioned. In executing the hazardous work connected with the building, the appellant took all necessary precautions.

They also refer to May v. Burdett, 9 Q. B. 101; Ellis v. Sheffield Gas Consumers' Co., 2 W. R. 19, 2 E. & B. 767; Fletcher v. Ryland, L. R. 3 H. L. 330, 17 W. R. H. L. Dig. 17: Gray v. Pullen, 13 W. R. 257, 5 B. & S. 970; Allen v. Hayward, 7 Q. B. 960; Steel v. Southeastern Ry. Co., 16 C. B. 550, 3 W. R. C. L. Dig. 154; Gayford v. Nicholls, 9 Ex. 702; Milligan v. Wedge, 12 A. & E. 737; Lemaitre v. Davis, 30 W. R. 360, L. R. 19 Ch. D. 281; Pearson v. Cox, L. R. 2 C. P. D. 369, 25 W. R. Dig. 166; Metropolitan Building Acts, 18 & 19 Vic., ch. 122; Hilliard on Torts, 445; Gilbert v. Reach, 4 Duer (N. Y. Rep.), 423. [Lord BLACKBURN referred to Laugher v. Poynter, 5 B. & C. 554, and Quarman v. Burnett, 6 M. & W. 499.]

Webster, *Q. C.*, and *McCall*, for the respondent.—A person who undertakes hazardous work is responsible for the consequences. The danger was known, and occurred in the course of the contract entered into by the appellant. This work was hazardous, and in the absence of any proof that the danger was over the appellant is liable.

June 4.—Lord BLACKBURN.—This is an appeal against an order of the Court of Appeal dismissing an appeal from an order of the Queen's Bench Division, discharging a rule obtained by the defendant to enter judgment on the ground that the

judge ought to have directed a verdict for the defendant, or that there should be a new trial.

The first point to be considered is what was the relation in which the defendant stood to the plaintiff. It was admitted that they were owners of adjoining houses between which was a party wall, the property of both. The defendant pulled down his house, and had it rebuilt on a plan which involved in it the tying together of the new building and the party wall, which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a right so to utilize the party wall, for it was his property, as well as the plaintiff's: a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went as far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think the duty went so far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty was cast upon the defendant, he could not get rid of the responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfill the duty which the law cast on himself, and if they so agreed together to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

This is the law, I think, clearly laid down in Pickard v. Smith, and, finally, in Angus v. Dalton. But in all the cases on the subject there was a duty cast by law on the party who was held liable. In Angus v. Dalton, and in Bowers v. Peate, the defendants had caused an interference with the plaintiff's right of support. Chief Justice Cockburn, it is true, in Bower v. Peate, after showing this, says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground—namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and can not relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act which he has ordered to be done from becoming wrongful."

I doubt whether this is not too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post horses and a coachman from an inn bound to see that coachman, though not his servant but that of the innkeeper, used that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed, not being a court of error, had no power to alter the law laid down in Quarman v. Burnett. But if I am right in thinking that the defendant in consequence of his using the party wall, of which the plaintiff was part owner, had a duty cast upon him by law, similar to that which in Dalton v. Angus it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far this general language should be qualified.

I do not think the case of Butler v. Hunter, 10 W. R. 314, is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them.

If this be so, the question is, I think, narrowed to this: Was the operation, during which the defendant's duty required him to see that reasonable care and skill should be used over, at the time when those engaged in the work cut into the party wall between the defendant's house and Baron's? for it is not disputed that there was a want of skill in doing this, and that it caused the damage; and it is not disputed that the men who did it were intending to carry out the work on which they were employed.

The defense opened at the trial, I think, was directed to this, that the contractor was bound not to anything without written authority, and that there was no authority at all to cut into the party wall. I do not think that could prevent the act which was done from being in breach of the defendant's duty.

The late Lord Justice Holker, however, thought, as I understand him, that the whole of the operation connected with the use of the plaintiff's party wall was over, and that the contractor's men were engaged in a subsequent independent job, and that the defendant was under no further duty than that he would have been if, after the house was finished, he had brought in carpenters to repair a wooden staircase. I can not, however, take this view of the counsel's opening. I regret that the case was stopped on the counsel's opening, for I feel convinced that if the evidence had been gone into, this view of the facts could not have been taken. As it is, I do not think it necessary to say more of the view of the law taken by the late lord justice than that I think it well worthy of consideration in any case where the facts are as he seems to suppose.

I think that the order appealed against should be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—In this case I have had great difficulty in forming an opinion satisfactory to my own mind, not because of any doubt as to the

law, but because I do feel doubtful whether I rightly apprehend the facts which I ought to assume as the basis of my judgment. It is very much to be regretted that the case was not submitted to a jury. Had that course been followed it is certain that the facts would have been ascertained, and it is highly probable that no question of law would have arisen. As it is, we are left to discover the facts upon which our judgment must depend from a very long and argumentative statement made by the appellant's counsel; and in regard to the true import of that statement, the parties at the bar widely differed. Accordingly we heard quite as much argument about the meaning of what Mr. Philbrick said to the jury as upon the law of the case. In the Court of Appeal, the result of this unsatisfactnry state of matters was that the late Lord Justice Holker took a somewhat different view of the facts from his colleagues, which led him to a different result in law.

Had your lordships not thought otherwise, I should have been inclined to send the case back to the jury for their determination. It is, in my opinion, neither satisfactory nor expedient to decide important questions of law upon a hypothetical statement of facts; especially when the litigant parties are not agreed as to the meaning of the statement. Here the appellant says that his counsel meant to indicate to the jury that he was about to prove, or would try to prove, certain facts; the respondent, on the other hand, says the statement of the appellant't counsel, when carefully read and construed, indicates that he meant to prove something materially different from these facts. I feel a great dislike to criticise the oral statements of a counsel as if they were part of the record, and conceive that I am bound to construe them most liberally in favor of his client. I rather think the Lord Justice Holker must have been, to some extent, influenced by these considerations, in putting a different construction upon Mr. Philbrick's language from that which was adopted by the other members of the Court of Appeal. Although I do not agree with the view taken by the late lord justice, I am not certain that I take precisely the same view of the facts with your lordships; and it is on that account that I have found it necessary to explain the grounds upon which I have come to the same result.

I agree with your lordships that it was the duty of the appellant, in carrying out his building operations, to see that reasonable precautions were taken in order to protect from injury the eastern wall of his tenement, of which the respondent was part owner. The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party wall if no precautions were used, nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury, was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house. Now, looking to the terms of the contract and specification, I think it does appear that extensive structural operations, fraught with obvious risk to the party wall in question, had been carefully and successfully executed, and if I had been able to come to the conclusion, in fact, that, after these were completed, there remained nothing to be done by the contractor which could reasonably be supposed to involve danger to the party wall, I should have been disposed to agree with Lord Justice Holker. I do not think that the combination in one contract of operations hazardous, and operations in no reasonable sense hazardous, can affect the character of these operations, or impose upon the employer legal duties and liabilities to which he would not have been subject had he employed a different contractor for each operation.

But I am not satisfied that the fitting up of a wooden staircase, from the basement floor of the appellant's tenement to the cellar below, was an operation which could occasion no risk to the party wall. It was an operation which might be executed in at least two different ways, either by cutting a groove in the south party wall, and inserting in it one of the wooden stringers supporting the stair (which would probably make the neater job), or by leaving the wall untouched and fixing the staircase outside it. I see no reason to doubt that the latter method would have been unattended with danger to the wall against which the stair was to be placed, or to the party wall in which the respondent is interested. The other method was, as the result showed, attended with serious danger to both these walls, and I can not find any suggestion in the statement made by the appellant's counsel, to the effect that no one could have reasonably anticipated that a workman might cut the wall in order to let in a stringer. The statement, which was very strongly and repeatedly made regarding it, is that the cutting of the wall was unnecessary, and was not only unauthorized but positively forbidden. Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorized and forbidden it also was, in this sense, that by the terms of the contract and relative specifications the contractor was bound to leave the wall untouched. But the terms of the contract and specifications are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to suppose that an ordinary workman intrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut it, but he failed in his duty to the respondent when he permitted the contractor and his workmen to neglect that precaution.

I am of opinion that the appellant co ld no-

establish a good defense to the respondent's claim by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances, the only inference in fact which I can draw is, that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor, but in accordance with the principle laid down in Bower v. Peate and Angus v. Dalton, it was no less the duty of the appellant, as in a question with the respondent, to see that they are strictly observed.

Lord FITZGERALD.—The question in the case seems to be rather one of controverted fact than of law. The defendants did not endeavor to escape from the principles to be deduced from Dalton v. Angus, Tarry v. Ashton, 24 W. R. 581; Bower v. Peate, and Pickard v. Smith, 10 C. B. N. S. 470, or deny their applicability, and on the other hand the plaintiff's counsel admitted the law as stated by the defendant's counsel.

For the defendant, it was contended that the work on which the defendant was engaged, if originally hazardous, had ceased to be so, inasmuch as all that was hazardous had been completed, and that the particular work which was being done was not dangerous in itself, or likely to produce danger, and that the wrongful or negligent act of the workman, which it was said cased the calamity, was entirely collateral, and wholly unauthorized.

I agree with the learned and noble Lord Blackburn in regretting the course taken at the trial, for I can not help thinking that if the evidence had been fully gone into we should probably not have heard of the case. We are now obliged to take our view of the facts from the opening statement at the trial of the defendant's counsel, and I have considerable doubt whether the real cause of the fall of the defendant's new house is not traceable to another and different source than that which has been assumed, and which, if ascertained, as a matter of fact, might have exonerated the contractor, and rendered clear the liability of the defendant. The undertaking the defendant was engaged on was no doubt as a whole perilous to his neighbors on both sides, and such as to render care and precaution necessary at every step, until the whole of the new structure was substantially completed, or so far at least that nothing remained to be done which could affect the stability of either of the party walls.

Part of the original design was that the party wall at Baron's side should be taken down and rebuilt from top to bottom. Thus we find that the specification provides, "The contractor to take down the party wall of adjoining building in the Haymarket, and cart away all the old bricks and rubbish, grub up old foundations, and prepare levels for rebuilding new party wall."

The defendant's counsel (Mr. Philbrick) in one part of his statement, said: "Now, I ought to mention to you one very important fact, and it is this. There was the party wall which stood between Baron's house and the house here, which was to be rebuilt by Mr. Hughes. This party wall, it was proposed by Mr. Wimble, and assented to by Mr. Hughes, on these plans and specifications, should be entirely taken down and rebuilt. Mr. Hughes would have to be at the expense of doing so, because he was the building owner." In place of carrying out the specifications the plan was departed from as to this old party wall; it was underpinned, and then up to the first floor (about 14 feet high) left untouched, but from that point upwards a new party wall was built on it, and necessarily of greater height and greater weight than the old wall. It was the old portion of this party wall which gave way, and by its fall caused the fall of defendant's house, and the displacement of the girder which was clinched into the plaintiff's party wall, and caused the mischief of which the plaintiff complains.

If Baron's party wall had been entirely re-built as it ought to have been, it is not at all probable that the calamity would have occurred. A new brick wall has great cohesive power, and as it would be smooth, no chipping or hacking would be necessary to fit on the stairs, and it would probably be unaffected by chipping or hacking, and even cutting into it to fit the wooden staircase, or the stone steps would not affect its stability so as to create danger. As to the old wall, it was different; it was of unknown antiquity, and the part that was left seems to have been weak out of plumb, with an uneven and rough front, which, according to specification, was to be hacked off and levelled, and it had a great superincumbent weight of new work placed on it. It yielded from its inherent weakness to the cutting and shaking it received in the process of fixing the wooden and stone steps, and came down.

Mr. Philbrick thus describes it:—"Then, from the first floor up to the second floor it was intended to have a flight of stone steps, the ends to be let into the wall from which they depend—pinned into the wall; that involves, of course, cutting into the wall a sufficient depth and plugging up the holes, after you have got the end of the step in. But they began at the bottom, and got the bottom step with the door on the floor morticed or let into the wall, pinning it

into the wall properly at one end and filling that up with cement, and then the next step is fixed above it, and the next above that, and so you go on according to the slope at which your staircase rises. The men were fixing on the day of the accident this flight of stone steps. But independently of that the men who were employed by Messrs. Newman & Mann, the carpenters, were also fixing a flight of steps which led down into the basement—wooden steps, and without any knowledge of the foreman of the works, and without any order from him, without any knowledge at all of either of the architects, or anything shown on the plan to that effect, or prescribed in the specification, the workman had, on his own head, and, as it were, utterly unauthorized, cut into the wall below the level of the ground floor—that is to say, the lower portion of the party wall which had been left—he cut into it."

He then describes the fall:—

"The whole appeared to collapse in the centre, to go down, no doubt, partly or chiefly got in motion by the fact that this party wall had been, by the unauthorized act of the workmen, unduly and improperly weakened; that had set the thing going and, and the girder gave way; the wall gave way, and the collapse took place as I have described."

The act of the workmen may have been unauthorized and ill-judged, but it was an act, no doubt, done in the execution of the work intrusted to them, and can in no case be said to have been entirely "collateral;" and it is not to be forgotten that the contract provides that "complete copies of the drawings and specifications are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractors, and to whom instructions can be given by the architects," and who is, of course, to direct the workmen in their operations, and who ought to see that what they are doing is necessary and lawful, and carried out in the safest manner.

Then was the perilous portion of the work completed before the doing of the act which it is said led immediately to the fall of Baron's party wall, and the consequent injuries to plaintiff's premises? I should have answered that question in the negative without any hesitation if it had not been for the opinion expressed by the late Lord Justice Holker, which I receive with the utmost respect.

The event shows that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party wall. Lord Justice Holker seems to have been of opinion that, though the operation as a whole was perilous, yet that the peril had ceased though the work was not completed. He says, as to the particular portion of the work, "It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty—they made a mistake." But is it open to us to divide the work thus into sections, and say as to a particular part, taken by itself, it carried with it no special peril, and you, the defendant, are not responsible?

It seems to me this cannot be done. We should not be justified in thus breaking it into parts, or considering the case as if the putting in the stairs or the stone steps was the sole work which the defendant was getting done. The conclusion I have reached is that the defendant had undertaken a work which, as a whole, necessarily carried with it considerable peril to his neighbors. In the execution of that work the party wall at Baron's side was so injured that it fell in, and its fall dragged down the new building, and injured the plaintiff's party wall and premises.

What is the law applicable? What was the defendant's duty?

The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant as insurers of their neighbors, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbors from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbor caused by any want of prudence or precaution, even though it may be *culpa levissima*.

It seems to me that the peril to the plaintiff's premises continued as long as there remained anything to be done which could interfere with the stability of the girder on which the defendant's house rested, and which the defendant had fastened into the plaintiff's party wall, and that there was that want of due supervision and due precaution which makes the defendant liable.

CHATTEL MORTGAGE — STOCK IN TRADE —RIGHT OF MORTGAGEE TO SELL.

BRACKETT v. HARVEY.

New York Court of Appeals.

1. A chattel mortgage of a stock in trade which leaves the mortgagor at liberty to sell is not necessarily void if the right to sell is conditioned upon the application of the proceeds to the mortgage debt.

2. Nor will a stipulation that the mortgagor may sell upon credit, taking good business paper at sixty or ninety days, render the security void, if it is accompanied by an agreement on part of the mortgagee to receive and apply such paper on the mortgage debt as cash.

3. Nor will a chattel mortgage which provides for periodical renewals be rendered void by the fact that

by implication it allows the mortgagee to sell and use the proceeds of sale to replenish the stock, the provision for renewals being intended to cover such additions to the stock.

The defendant sold the lease of a lumber yard, the fixtures and a stock of lumber to one F. E. Darrow. The contract provided that the purchase-price should be secured by Darrow's notes "and by chattel mortgage on the stock, and which chattel mortgage is to be renewed monthly." It was also further stipulated as follows: "And said Harvey also agrees that he will take the business notes running sixty or ninety days, to be indorsed by said Frank E. Darrow, and apply the same in payment of Darrow's said notes as they fall due." In pursuance of said contract, Darrow executed and delivered to the defendant a chattel mortgage with schedule of lumber annexed. This mortgage covered all the lumber and stock sold, also the barn and other leasehold improvements. The mortgage recited that its execution was pursuant to contract given November 29, 1873. The mortgage was renewed from time to time. The following provision is contained in all: "And the said Frank E. Darrow & Co. covenant and agree that as said lumber and property is sold and disposed of by them, they will apply the proceeds thereof to the payment of the debt hereby secured." The last three were dated respectively, July 3, August 9, and September 7, 1875. In August, 1875, defendant took possession under his mortgage and sold the property. In December Darrow was adjudicated bankrupt and plaintiff appointed assignee.

FINCH, J., delivered the opinion of the court:

The two mortgages assailed by the assignee in bankruptcy were not void on their face, and as a legal conclusion from their express terms, reading them as both parties do, in connection with the original agreement of sale, and as steps in its performance they permitted but three things, to one of which the other three were merely incidental, which differed from the ordinary stipulations of a chattel mortgage. The mortgagors were left at liberty to sell and dispose of the mortgaged property but upon a condition involved in their covenant, that they would apply the proceeds of such sales to the payment of the debt which the mortgage secured. As subsidiary to this general provision the two others may be fairly gathered from the agreements taken together; that the mortgagors might sell on credit, taking good business paper having sixty or ninety days to run, and which paper the mortgagee would accept and apply on the debt; and that the mortgagors might use a part of the avails of the sales to replenish and freshen their stock, but if they did the substituted property was to be placed by the monthly renewals in the room and stead of that which was sold to procure it. If we state these latter stipulations somewhat differently from the version of them given by the appellant, we are yet convinced that no other or wider statement of them is a just inference from the provisions of the original contract.

Three cases decided in this court in rapid succession held that a chattel mortgage was not *per se* void because of a provision contained in it allowing the mortgagor to sell the mortgaged property but accounting to the mortgagee for the proceeds and applying them to the mortgage debt. Ford v. Williams, 24 N. Y. 359; Conkling v. Kelly, 28 N. Y. 360; Miller v. Lockwood, 32 N. Y. 293. These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt, and the further doctrine of one of these cases, that under such a stipulation the proceeds, realized by the agent, are to be deemed realized by the principal, and as against an adverse lien, are to be applied on the mortgage debt even though not actually paid over, (Conkling v. Kelly, *supra*,) shows how impossible it is that any fraud, or injury to others, can be imputed to the agreement. If the mortgagor sells, and actually pays over the whole proceeds, nobody is harmed, for that only has happened—which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds have not been paid over, the adverse lien is still unharmed, for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although as between mortgagor and mortgagee the debt remains and is still unpaid. The effect we have thus given to the stipulation under discussion has received the approval of the Federal court, in a case where the whole subject was deemed open, and the true rule at liberty to be sought out, unaffected by decisions often conflicting and said to be impossible to reconcile. Robinson v. Elliott, 22 Wall. 524. While holding that provisions which allow the mortgagor to sell for his own benefit are necessarily fraudulent since they strip the mortgage of its whole force as a security to the holder, and make it merely a shield to the debtor, the court carefully qualified its judgment by adding that such results did not follow where the sales were to be for the benefit of the mortgagee and their proceeds to be paid over to him. Nor does the recent case in our own court, of Southard v. Benner, (72 N. Y. 424,) question this doctrine. In that case there was no agreement to sell for the benefit of the mortgage and apply the proceeds to the debt. The trial judge charged that if the mortgagee knew of the sales, but supposed the money was to be applied on the debt there was no fraud in law; and the decision went upon the ground that the jury had found and there was evidence to justify it, that the mortgagor was permitted, by the conscious

assent and agreement of the mortgagee, to sell the property as he pleased for his own benefit, precisely as if the mortgage had no existence. We see no reason to doubt that on their face the mortgages here assailed were valid, unless the two incidental or subsideary facts operated to modify the result. The first of these was the implied permission to sell for good business paper running sixty or ninety days, which paper the mortgagee was to take and apply on the debt. This stipulation is an inference from the provision of the contract by which Harvey agreed to accept such business paper as cash. No express liberty to sell the mortgaged property on credit was given, and the only proper inference of such liberly to be drawn as it respects sales of the mortgaged property is that which we have stated. It was thus a provision in entire harmony with the covenant to apply all sales to the mortgage debt. If the sales were for cash that was to be paid over; if on a credit of sixty or ninety days secured by good business paper that was to be at once taken as cash and applied as cash. No permission to sell in any other way was given or can be inferred from the contract, and that actually given, made the paper permitted to be taken cash as between the parties, to be at once applied upon the debt. We do not see how such a person can be said to affect injuriously the rights of other creditors, It can only become dangerous by straining it beyond any just inference and construing it to be a general permission to sell on credit without limitation. The second incidental fact is the implied permission to use proceeds for replenishing the stock; the goods bought to be substituted in the mortgage for those sold. This again is an inference from the stipulation in the original contract for monthly renewals. These could only be necessary to bring in after acquired property, and permission to acquire it with proceeds of sales is perhaps a just inference, but then only upon condition that the substituted property be bought in and subjected to the mortgage lien. Thus understood it provides only for a shifting of the lien from one piece of property to another taken in exchange. In no respect did it permit anything mortgaged to escape the mortgage. If it did not turn into cash or paper, which reduced the mortgage debt, it turned into other property which became itself the subject of the mortgage lien. We think, therefore, that on the face of the papers, giving them a fair and just construction, there was nothing which constrains us to deem them fraudulent in law.

But the contention of the assignee does not stop with the inferences to be drawn from the papers themselves. He insists that outside of them there was evidence of an agreement between the parties by the terms of which the mortgagors were permitted to use the proceeds of sales in part to meet the expenses of the business and for the support of the mortgagors and their families,such an agreement made at the time of the written one, but outside of it and by parol, we held in Southard v. Benner, *supra*, might be proved and serve to establish a fraudulent purpose; and the learned trial judge has found as a fact, that at the date of the contract, and of the several mortgages executed pursuant thereto, "it was understood and expected by all of the parties thereto,that the avails of the sales made in said business were to be used in the transaction of said business in paying the personal expenses of the said Frank E. Darrow and of the members of said firm, including their own and their families' support and maintenance." If there was evidence to sustain this finding, it is necessarily fatal, for such an agreement opens the door to fraud and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors. To this finding of the trial court the appellant specifically excepted, and the inquiry now is whether there is any evidence to sustain it.

We must not forget that it is an agreement which is to be proved. The mere exception of one party or the other is not enough; it must be the conscious, concurrent assent of both. It must be proved and not merely suspected. for it is an attempt to establish fraud where innocence is to be presumed, and to contradict by parol the actual written agreement of the parties and reduce that to a mere cover and artifice. When we examine the proofs it becomes apparent that no such actual agreement was directly made; no conversation upon the subject took place; the matter was never discussed; no words were ever exchanged which conveyed such assent from one to the other. We come down at once to indirect proof, and into the region of inference. When there we find but two sorts of evidence; one, the alleged expectation of Harvey,the other his knowledge of the conduct of Darrow & Co., and of their mode of doing business. The evidences to Harvey's expectation was very brief and was this. To the question, "did you understand that Darrow was to go on and sell the lumber so transferred by you to him?" he answered, "yes; and he did so, as I understand, agreeing to pay me the proceeds, and he paid me the proceeds as fast as he received them, except what he used in replenishing his stock." Here the agreement is stated and the fact which followed it. All the proceeds of sales of the mortgaged property were to be paid over, and as Harvey understood were so paid, except what was used to buy new stock. He was then asked, "did you understand that he used a share or portion of the proceeds of the business for his own and his families' support?" Observe the point of this inquiry. It does not ask what was the agreement of the parties. That had already been stated, and was written out in the mortgages subsequently given, and was inconsistent with any right of the mortgagors to divert the proceeds of the mortgaged property to their own support. The inquiry is limited to the separate action of one of the parties which might prove to be a violation of the agreement. And then, too, it is the

use made of a portion of the proceeds "of the business" and not of the proceeds of the property mortgaged which is the subject of the inquiry. The witness answered: "I suppose he used the profits of the business for their support." This is a statement, not of his supposition when he made the contract or when any mortgage was given, of what Darrow would do, but merely of his supposition at the moment of his testimony and in the light of all which had been developed of what Darrow had in fact done. And even that opposition relates to the business and the business *profits*, and not to the proceeds of the mortgaged property. Profits could only arise after the payment of debts. They could not arise out of sales of the mortgaged property until the debt representing its cost was paid. The profits realized would be the surplus remaining. Then, too, it was the profits of the business to which the witness referred. It is said, however, that the mortgagors must have lived out of the proceeds of the mortgaged property, because there was nothing else upon which they could have lived; and Harvey must have known the fact, and not objecting, be held to have assented. This is the general view of the case founded upon the facts occurring. We think the proposition is not sound. There were proceeds of the business outside of sales of the mortgaged property upon which Darrow & Co. could have lived without touching the latter. The purchase-price of that was about $23,000. Deducting from it the cost of the leasehold improvement, which appears to have been $6,250, it leaves of lumber to be sold about $17,000, at the commencement of the business. But the actual sales of the first year are estimated at $68,000, or nearly four times the cost of the original lumber; and while some part of the new lumber purchased went into the mortgage by additions, yet there is no ground for supposing that the whole of it did. The original mortgage was given in December of 1873, and the first addition to its schedule was in March of 1874. During the interval of three months there may have been, and judging from the size of the business, there must have been many purchases and sales, the proceeds of which latter were in no manner bound by the mortgage, and could be used by Darrow & Co. as they pleased, although the understanding existed by parol which at the end of the interval was written out in the mortgage. Another period of four months intervened between mortgages C and D, and other intervals, some of two months and others of one occurred. There must have been, therefore, proceeds of the business not bound by the mortgage upon which Darrow & Co. could have lived; and that they did so, is made more probable by the fact that in the end they prove to be in debt beyond the mortgage in a sum of about $12,000, or much more than enough to account for their living and business expenses, without at all touching upon proceeds of the mortgaged lumber.

And again, we find no evidence that the proceeds were in fact diverted from their lawful application. Harvey says they were not to his knowledge, and Darrow does not say that they were; so that there is no foundation in the facts which occurred in the transaction of the business for an inference of an agreement to divert the proceeds of the mortgaged property. We see no evidence of an agreement for such diversion, or of such diversion in fact. The debt of the mortgagee was an honest debt Its security by chattel mortgage was just and right. Both parties have sworn that there was no fraudulent intent. The mortgagee was at times lenient, desiring the success of his debtors, but all the time supposed, and had good reason to suppose, that the property mortgaged, or that bought by its proceeds, was being steadily appropriated to the payment of the mortgage debt, until just before his seizure of the property remaining, and that seizure was made promptly upon the discovery that the security was lessening. The whole transaction impresses us as honest and just, and we can not assent to the conclusion that it was fraudulent and void.

But the respondent still defends the judgment by seeking to apply to the case the doctrine of Conkling v. Kelly, *supra*. He argues that on the assumption of the validity of the mortgage, there was nevertheless enough realized from the sales of the mortgaged property to have paid them in full, and such proceeds must be deemed to have been so applied, as against the assignee in bankruptcy representing creditors. Without considering the question of the actual foreclosure and possession by the mortgagee, before the filing of the petition in bankruptcy, and granting, as was held in Southard v. Benner (*supra*), that the assignee representing the whole body of creditors stands in the same position towards alleged fraudulent incumbrances, as a single creditor having a lien by judgment and execution, there are still sufficient answers to the respondent's contention. He has no adequate facts as a foundation. What he relies upon, and all that he relies upon, is the estimate of Darrow that the sales of the first year reached $58,000, and the actual receipts $50,000; and the sales of the second year were $20,000, and the receipts $10,000. But these, as we have seen, were proceeds of the whole business, not of the the mortgaged property alone. They were not all bound to be applied. What proportion of them came from the mortgaged lumber is not shown and we do not know. It is not made to appear that a single dollar was received from this source which was not applied as received upon the mortgage. On the contrary, the evidence indicates that it was. But whatever may be the truth it is enough to say that we have no facts from which to infer a misapplication of any specific amount which therefore needs to be credited as a payment upon the mortgage. There is this further answer to proposition. The creditors, whom the assignee represents, are not shown to have been creditors

when the mortgage of July 1875, was given. So far as we have a list of them their debts matured thirty days and longer after that date. When contracted, we do not know, but at least there is an entire absence of proof that any of them existed at that date. When that mortgage was given there was thus no adverse lien affecting, on any theory, the property, and it was entirely competent for mortgagor and mortgagee to deal with each other according to the actual facts. They did so deal and whether moneys had been realized and misapplied or not was immaterial to the dealing; since nobody is shown to have been in a position to raise the question. When the new mortgage was then given it fixed and secured the debt remaining unpaid, and was valid for the full amount. We do not approve the contrary doctrine of the general term upon this point. It proceeds upon the idea of a payment as between mortgagor and mortgagee which is sufficient, *pro tanto*, to cancel the mortgage debt and leave to the mortgagee only an unsecured claim against his agent for moneys misapplied. But as between them they remain mortgagor and mortgagee with the original debt unpaid and its security unaffected. The doctrine of an agency and a constructive payment simply describes and enforces the equity of a lien in collision and has no existence except as incidental to that. In its absence and as between the original parties, both debt and security remain. Harvey sold under the July mortgage as well as the others, and may rely upon it to defend his title, and in so doing cannot be charged with prior sales even if unapplied, nor with subsequent sales since none are shown to have been made. The constructive payment equitably asserted for the benefit of an adverse lien can never apply where such lien does not exist and the question is wholly between the original parties. That appears to have been the situation when the July mortgage was given, and limits the possibility of constructive payments to a period subsequent to its date and to justify those there is no evidence. We must, therefore, hold that the ground of constructive payment is not tenable.

The respondents final reliance is upon the provisions of the bankrupt act. The mortgages of August and September were executed within two months of the filing of the petition of bankruptcy and are therefore claimed to have been an unlawfull preference. The special term decided against this contention upon the ground that the mortgages were given in execution of the original contract, and the mortgagee had an equitable right founded upon that contract, and long antedating the prescribed two months, to compel the execution of such mortgages. The general term did not dispute this ruling but rested its conclusion upon a different ground. We think, in this respect the courts below were right. The preference which Harvey obtained was in fact given to him and secured by the terms of the original contract. The latter mortgages were but details of its execution, and gave him no new preference, since in equity, where that which is agreed to be done is treated as done, the preference already existed and could have been enforced. The cases cited by the trial court and upon the brief of the appellant fully justify this conclusion. But our construction of the original contract makes a further observation necessary. We confine the contract right to a lien upon newly acquired property, to such as was bought with the mortgage proceeds and became incumbered by substitution. It was shown that some of the property described in the August mortgage was bought on credit, and not paid for, and so was not within the purview of the original agreement. But if that be true, it is also true that the mortgage of July, which preceded the petition in bankruptcy by more than the prescribed two months, covered all the property specified in the later mortgages except items amounting to about $200. That mortgage was unaffected by the prohibition of the bankrupt act, the sale was made under it as well as the others and it may be relied upon in defense of Harvey's title. And if the items of the $200 were paid for out of sales of mortgaged property, they also are protected upon the ground first stated.

It is further urged that the August and September mortgages were taken by Harvey out of the usual course of business and with knowledge that Darrow & Co., were in fact insolvent, and the trial court has so found. But this finding was made in April, 1879, and before the decision in this court of Guernsey v. Miller, (80 N. Y., 184) which was rendered in February of the next year. We held in that case that the Federal statute as amended (seç. 5128, U. S. R. S.) requires proof to avoid an assignment, that the assignee received it, not only with "reasonable cause to believe" that the assignor was insolvent, but, "knowing that such assignment was made in fraud of the provisions" of the act; and that such knowledge required more cogent evidence than mere belief. We find no proof of such knowledge. The facts relied upon are that Harvey made repeated extensions, that he sued the firm and recovered a judgment, and that he examined their books and business condition. The extensions were provided for in the original arrangement, and were matters of anticipated convenience. It was represented to Harvey, as he says and as Darrow admits, that the firm or some members of it, had real estate in Virginia worth $6,000, which they expected to sell and apply the proceeds on their purchase, but should need extensions if that fund was not realized in time. There was nothing in those extensions which indicated or tended to indicate insolvency under the existing circumstances. The judgment which Harvey recovered appears to have been upon business paper turned out to him by Darrow & Co., and which they indorsed. It is certainly possible that the suit was brought with a view to enforce collection against the makers and so relieve the indorsers, and that the latter were not expected to pay until all remedies against the makers were exhausted.

The attempted proof of an examination of the books of the firm by Harvey ended in substantial failure. Darrow testified: "I saw Mr. Harvey at the yard a hundred times; he asked how we were getting along; I presume we told him something about it; I have seen him with my books two or three times; I can not give the dates; father and Mr. Walker looked over with Mr. Harvey; I did not." Harvey testified: "I had no knowledge that Darrow & Co. were insolvent at the time I took the mortgage or took possession of the mortgaged property; I had no intent to defeat the operation of the bankrupt law." Darrow again said that the firm was embarrassed, "at the latter end, and for a few weeks before they closed." Walker testified that "Harvey did not look over the books to see how the affairs stood." And again: "Harvey did talk to me a few times about their business; he asked me how they got along, and I said as they could expect under the circumstances; that they were getting along very well; I did not go into details with him." On this state of facts, it is impossible to say that the proof established even a reasonable cause for a belief by Harvey of the firm's insolvency, and still less of knowledge by him of an intent to work out a fraud upon the provisions of the bankrupt act.

It is not necessary to consider the questions growing out of the assignment of accounts. Enough has been said to show that a new trial must be had, and when that occurs it may appear, what at present is left in doubt, whether these accounts represented sales of mortgaged property in whole or in part, where and how they were payable, and whether or not they were taken absolutely at their face or otherwise. The evidence relating to them is very brief and somewhat confused. It seems best, therefore, to leave that question open for the effect of further evidence.

The judgment should be reversed and a new trial granted. costs to abide event. All concur.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY — SIGNATURE— UNAUTHORIZED ADDITION OF SEAL.

An unauthorized seal added by an agent to his signature may be rejected as a separable excess of authority, and the agreement may stand as a simple contract. When there is a complete execution of a power and something *ex abundantia* is added, which is improper, the execution is good, and only the excess is bad; but where there is not a complete execution of a power, or the boundaries between the excess and the execution are not distinguishable, it is bad. *Thomas v. Joslyn*, S. C. Minn., May, 1883; 16 Rep. 81.

2. CONSTITUTIONAL LAW—REGISTRATION OF TACIT MORTGAGES IN LOUISIANA.

Article 123 of the Constitution of Louisiana, adopted in April, 1868, providing that "the tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the 1st of January, 1870, unless duly recorded," and the act of the legislature passed March 8, 1869, in pursuance thereof, regulating the manner of recording such mortgages and privileges, do not impair the obligations of contracts or violate the provisions of sec. 1, art. 14, of the amendments to the Constitution of the United States. *Vance v. Vance*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 854.

3. CONTRACT—REPRESENTATIVE CAPACITY.

Where, in the body of an instrument, the obligation created purports to be a personal one, although it is signed by defendants as trustees, the language of the body is controlling, and they are personally liable. Where property is purchased on credit by trustees of a township, and an indebtedness could not legally be created therefor against the township, unless a tax has been already levied and set apart for meeting it, and this has not been done, it must be considered that the trustees intended to contract personally for such property. *Revolving Scraper Co. v. Tuttle*, S. C. Iowa, June 15, 1883; 15 Ch. Leg. N. 367.

4. CRIMINAL LAW—MURDER — PREMEDITATED DESIGN.

1. "Premeditation" is defined as meaning intent before the act, but not necessarily existing any extended time before the act. "Premeditated design," as used in the statutes relating to homicide, means an intent to kill, design means "intent," and both words imply premeditation. 2. The question of premeditation is a question of fact, and not of law, and like all other facts it must be determined by the jury. 3. A charge to a jury, that "on the subject of malice or a premeditated design, I instruct you that when a killing is proved, the law presumes that it was done from a meditated design, unless it shall appear from the evidence, either on the part of the defense or the State, that there was excuse or justification; and in the absence of explanation, the law implies malice, or a premeditated design from the use of a deadly weapon: *Held*, to be error. 4. It is not in cases of a doubt, created by the evidence, in the minds of the jury, that they are to acquit a prisoner on trial, but it must be a reasonable doubt, one comformable to reason—a doubt which would satisfy a reasonable man. It is said to be "that state of the case which, after the comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Earnest v. State*, S. C. Fla., July 10, 1883.

5. CRIMINAL LAW — PERJURY — "DECLARATION" AND "CERTIFICATE."

The words "declaration" and "certificate," as used in sec. 5392 of the Revised Statutes, are not used as terms of art or in a technical sense, but are used in the ordinary and popular sense, to signify any statement of material matters of fact sworn to and subscribed by the party charged with perjury; and if he did not believe such mat-

ters to be true when he swore to and subscribed the statement that they were true, he is guilty of perjury as declared in that section. *United States v. Ambrose*, U. S. S. C., April 23, 1883; 2 S. C. Rep. 682.

6. DAMAGES—DEATH OF HUSBAND—CONTRIBUTORY NEGLIGENCE—FELLOW-SERVANT.

This suit is for the recovery of damages for the death of plaintiff's husband, who died in consequence of injuries received at defendant's round-house. The deceased was in the employ of the defendant as fireman, and at the time of the injury he was sleeping at the round-house where with other employees of defendant had been in the habit of sleeping with defendant's knowledge and consent ever since its erection. He was lying at the time between two stalls, and while asleep had turned over so that one foot lay on the rail of the track. The engine was backed over his foot by one of defendant's agents or servants, and was injured to such an extent that amputation became necessary, and from which he died. The only lights in the house at the time were, as usual, small tin hand lamps or torches carried around by the men in their hands. Plaintiff recovered judgment for $5,000. *Held*, the deceased and the fireman who ran the engine were fellow-servants, and if his death was occasioned by the negligence of the fireman, plaintfff was not entitled to a verdict. Even if defendant failed in its duty to furnish sufficient lights, he was aware of the danger of sleeping in such a place, and it was not only carelessness but such carelessness as amounted to recklessness, to voluntarily place himself in such danger. It is no answer that he was permitted to do so by the defendant, for he was as well aware of the extent of the danger as the company. *Price v. Hannibal, etc. R. Co.*, S. C. Mo.

7. EXECUTION — UNREASONABLE SEIZURE BY SHERIFF.

Where the sheriff seizes the whole or an unreasonable amount of the debtor's property unnecessarily, under writ of execution, he renders himself liable in damages at the suit of the owner. *Handy v. Clippert*, S. C. Mich., April, 1883; 15 Rep. 721.

8. INDIAN COUNTRY—INTRODUCTION OF LIQUORS—INTERNAL REVENUE LICENSE.

Payment of the special internal revenue tax required to be paid by a retail liquor dealer for selling liquor in a collection district embraced in territory ceded to the United States by the treaty between the Red Lake and Pembina bands of Chippewa Indians, concluded on the 2d of October, 1865, does not exempt the party making such payment from the penalties imposed by the act of March 15, 1864, for introducing liquor into the Indian country. The laws of Congress are always to be construed so as to conform to the provisions of the treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States. *United States v. Forty-three Gallons of Whisky*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 906.

9. MANDAMUS—OFFICE OF WRIT—PRACTICE.

A writ of *mandamus* can not be used to bring up for review an order of the circuit court vacating and dismissing a writ of replevin, because the court had no jurisdiction to issue the same. Such order is a final judgment, and subject to review only on a writ of error. *Ex parte Baltimore and Ohio R. Co.* U. S. S. C., May 7, 1883; 2 S. C. Rep. 870.

10. MUNICIPAL BONDS — POPULAR ELECTION — IRREGULARITY.

As section 10 of the act passed by the Illinois legislature on February 24, 1869, to amend the act of February 25, 1867, incorporating the "Illinois Southeastern Railway Company," covered the entire subjects embraced by secs. 9 and 10 of the original act, and therefore operated as a repeal by implication of those sections, and removed the restriction limiting to $30,000 the amount which could be donated by a township to the said railroad company, the bonds issued in this case, to the amount of $100,000, were valid. Where a township has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact is certified on the face of the bonds by the authorities, whose primary duty it is to ascertain it; and the mere circumstance that the election was presided over and the returns made, not by the supervisor, assessor and collector of the township, *ex officio* judges of elections, but by a moderator chosen by the electors present, can be of no avail as a defense to the bonds in a suit brought by a *bona fide* holder. While this court, under the rule that where the construction of a State constitution or law has become settled by the decisions of the State courts, the courts of the United States will accept it as evidence of what the local law is, might be required to hold that under the charter of the railroad company, as decided by the Supreme Court of Illinois in Lippincott v. Town of Pana, 92 Ill. 24, the election in this case was irregular and void, it is not bound to accept the inference drawn by the Supreme Court of Illinois that the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void inthe hands of *bona fide* holders. This last proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which this court may form an independent judgment, and in respect of which it is under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be. As there was no illegality whatever in the consideration of the bonds in this case, and they were issued in good faith, the mere alleged irregularity in the election is not such an irregularity as will deprive the holder of the coupons of the presumption that he acquired them for value, and throw upon him the burden of showing that he paid value therefor. Non-residents are not bound by a decree in a State court rendered in a proceeding *in personam* in a case in which they were not named as parties, when there was no personal service upon, or appearance by them, and when the only pretense of notice to them of the pendency of the suit was a publication addressed to the "unknown holders and owners of bonds issued by the town of Pana." Whatever effect such decree may have upon citizens of the State where rendered, as to citizens of another State it is absolutely void. As the coupons after their maturity bore interest at the rate fixed by the law of the place where they were made payable, the court below properly allowed seven per cent interest, the legal rate in New York, where the bonds were payable. *Town*

of Pana v. Bowler, U. S. S. C., March 5, 1883; 2 S. C. Rep. 704.

11. NUISANCE—CONSENT—ESTOPPEL.
Though plaintiff consented to the building of the thing, of which he now complains as a nuisance, he is not estopped unless he gave such consent, knowing or having reason to know, that the thing when built would be a nuisance. His act or consent must have been such as to make any subsequent attempt on his part to recover damages therefor a positive fraud. *Corley v. Lancaster*, Ky. Ct. App., May 19, 1883; 1 Ky. L. Rep. & Jour., 39.

12. PUBLIC LANDS—LAND IN OREGON—SETTLERS ON UNSURVEYED LANDS.
Persons settling on public lands, not yet having any territorial government, under the laws of the United States, and which have not been surveyed, opened to settlement, pre-emption, or entry, acquire no rights thereby against the government, and no rights under the laws of the United States as against any one else to the possession of the land in his actual occupancy, except, and only so long as, such occupancy continued; they are merely tenants by sufferance, and the most they can claim is the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. According to the decision of the Supreme Court in 21 How. 293. Congress passed no law in any wise affecting title to lands in Oregon till the passage of the act of September 27, 1850, and prior to that date no one could acquire any title to or interest in the public lands in that territory. The act of August 14, 1848, organizing the Territory of Oregon, confirmed and established title to land occupied at that date as missionary stations among the Indians; but this act can confer no title upon those who had occupied lands in that Territory, but had abandoned them prior to the passage of the act and had never resumed occupancy. *Missionary Society v. Dalles City*, U. S. S. C., April 16, 1883; 2 S. C. Rep., 672.

13. SET-OFF—RECOUPMENT—REMOTE DAMAGES.
L contracted with B & J to construct a stone flume, to be completed by a day certain, on the site of a mill which had been destroyed by fire. It was the intention of B & J, when the contract was made, upon the completion of the flume, to erect thereon a corn-feed mill for temporary use, which intention was known to L. The flume was not completed until several months after the time provided in the contract. No corn-feed mill was ever built. In an action by L for the contract price of the flume. B & J recouped their damages for the loss of the use of the corn-feed mill, which they were prevented from building by reason of plaintiff's failure to complete the flume as contracted. *Held*, that such damages were too remote and uncertain, and an instruction to that effect by the court to the jury upheld.—*Bridges v. Lanham*, S. C. Neb., May 23, 1883; 15 N. W. Rep. 704.

RECENT LEGAL LITERATURE.

THIRD MCCRARY. Cases Argued and Determined in the Circuit Courts of the United States for the Eighth Judicial Circuit. Reported by George W. McCrary, the Circuit Judge. Vol. III. Chicago, 1883: Callaghan & Co.

The third volume of this excellent series will receive a warm welcome at the hands of the profession throughout the District, not only on account of the importance of many of the questions determined, and of the learning embodied in many of the opinions, but also on account as well of the thoroughly workmanlike manner (if the phrase is admissible); thus evidencing the reporter's fitness for one of the humblest as well as for the higher walks of the profession. The distinguished reporter has much enhanced the value of this volume by adding to many of the cases learned notes by distinguished practitioners and legal writers, among whom appear the names of Mr. Frank Hagerman, Judge S. D. Thompson and Mr. Francis Wharton. The mechanical execution is excellent.

MINOR'S INSTITUTES. Institutes of Common and Statute Law. By John B. Minor, LL.D. Volume IV. The Practice of the Law in Civil Cases, including the Subject of Pleading. In two Parts. Parts I. and II. Second Edition, Revised and Corrected. Richmond, Va., 1883: Printed for the Author.

We have hitherto spoken of the plan and the somewhat peculiar method of this work. 16 Cent. L. J. 99. The scope of this volume, as indicated by the title-page, is practice, including pleading.

THATCHER'S PRACTICE (CIRCUIT COURTS).—A Digest of Statutes, Equity Rules and Decisions, upon the Jurisdiction, Pleadings and Practice of the Circuit Courts of the United States; including Decisions relating to Pleadings and Practice at Common Law, in Equity, Appeals in admiralty, and in Criminal Cases. By Erastus Thatcher. Boston, 1883: Little, Brown & Co.

This volume, is supplementary to Thatcher's Supreme Court Practice, which we have heretofore noticed and commented upon favorably. 16 Cent. L. J. 300. It is upon the same general plan of that volume as there described. The work is carefully and conscientiously done and cannot fail to be of service to the practitioner in the Federal courts.

INDIANA PRACTICE, PLEADINGS AND FORMS, Adapted to the New Revised Code of Indiana, with a full Citation of all the latest Adjudicated Cases in Indiana, and Numerous Authorities under the practice at the Common Law and in Equity, and under the Codes of other States. By

John D. Works. Vol. II. Cincinnati 1883: Robert Clarke & Co.

We have heretofore expressed our approval of the method and matter of this work in reviewing the first volume. 15 Cent. L. J. 279. The second is fully up to the standard of its predecessor.

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[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

57. A railroad company graded a road across a stream and obstructed it with piling. The intention of the company was to throw themselves in communication with the gulf by means of steamers running up to where said road crossed said stream. The legislature of the State of Florida afterwards declared said stream navigable to a point three miles above where said road-bed crossed said stream. Said road is not completed. A company is chartered under the general act for improving the navigation of said stream. What will be the proper remedy at law, or otherwise, to remove the obstructions of said stream, so that steamers which now come up to said road may pass up to the point three miles above said road? Can the said corporation remove said piling without resort to the courts? Please give authorities referred to.

Sumpterville, Fla. A. C. C.

58. A purchased of B eighty acres of land in Iowa, and executed to B his two promissory notes and mortgage on the eighty acres of land as part purchase price. One note for $200 fell due on the first day of March, 1883, and one for $200 would fall due the first day of March, 1884, without interest. Before the first note fell due, B wrote a letter to A, offering to discount the note due March 1, 1884, 10 per cent., in case A would pay it off March 1, 1883, which A agreed to do. B lives in the State of Kansas. He sent the notes and mortgage to one C, who lives in Iowa, and who was to act as B's agent for the purpose of collecting the money and satisfying the mortgage. A tendered to C the full amount of the note less the discount. C refused to allow any discount, saying that B had written him not to allow A any discount at all. C then agreed to and with A, that if A would place the amount of discount in his (C's) possession, he (C) would hold it until the difficulty was finally determined between A and B; to which A agreed, and they called two disinterested parties to witness their agreement, as it was an oral one. In about eight or ten days thereafter, and without the consent of A, and without notifying A, C remitted the discount to B, who lives in Kansas. A and C live in Iowa. Is C liable to A for the amount of discount? G. C.

Seymour, Iowa.

QUERIES ANSWERED.

Query 41. [16 Cent. L. J. 499.] A is fined by a justice of the peace for a misdemeanor and appeals. He partially completes a recognizance by furnishing one surety— the statute requiring sureties—and offers to furnish another surety, but justice says it is satisfactory as it is, and releases the prisoner. The recognizance not complying with the law does not give the district court jurisdiction. Query. The district court never having acquired jurisdiction, has the justice lost his jurisdiction by allowing the prisoner to depart out of court without giving the proper bonds? G.

Beloit, Kansas.

Answer. It is my opinion that the justice undoubtedly lost jurisdiction. Clearly so, if the Kansas statutes do not expressly authorize the justice to issue some process whereby the defendant can be called into court again. That, "justices courts being courts of special and limited jurisdiction, unless they confirm strictly to the statutes they lose jurisdiction," is a principle of law well settled in all courts.

Minneapolis, Minn. H. E. Day.

Query 45. [16 Cent. L. J. 499.] A recovered a judgment against B before C, a justice of the peace. B paid the amount to C, who indorsed the judgment "satisfied in full; see receipt of constable." Afterwards C represented to A that D, the constable, who was then absent from the city, and whose term of office had expired, had collected the money and spent it, but that as a friend of D he (C) would procure for A, D's note with good securities for the amount if A would not sue on his bond, To this A agreed. Afterwards C delivered to A the joint note of himself, D and E. On a suit by A against the makers E pleaded that he signed the note as security for D at the request of C, and that D's signature was a forgery. C made default, and D was not sued. Was E's plea good on demurrer? X.

Pine Bluffs, Ark.

Answer. I have had occasion to investigate this question, and was the first to obtain affirmative decision in favor of the validity of the plea as can be seen by reference to the case of Seely v. People, 27 Ills., 173. This case was published at length and ably commented on in 2 American Law Register (New Series) 345. This case was in regard to surety on an Office Bond (that of a Master in Chancery.) In regard to negotiable instruments, the Supreme Court of Ills., in Stoner v. Mellikan, et al 85 Ills., 218 holds that this is not a good defense. From these authorities I am disposed to believe that the plea is bad on demurrer.

Query 50. [16 Cent. L. J. 499.] A owned 100 acres of land in Indiana. He is a married man, and deeds it directly to B, his wife. Then B deeds it to C and A enters the deed as B's husband. Where is the title? Is it all in C, or is there not an undivided one-half in B? Deeds were made since 1853.

Vincennes, Ind. W.

Answer. I am sure the title to the land is in C. See 35 Ind. 181; 7 Blackf. 510; 39 Ind. 528. There are also more recent decisions of the Indiana Supreme Court, not now at hand, all sustaining a deed by husband to wife without the intervention of a trustee. Of course, fraud must not enter into the conveyance.

Martinsville, Ind. Levi Ferguson.